Gillard v. L. 1549, DC 37 & OLR & ACS, 67 OCB 35 (BCB 2001) [Decision No. B-35-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding

-between-

FLORA GILLARD,

Petitioner,

Decision No. B-35-2001
Docket No. BCB-2195-01

-and-

DISTRICT COUNCIL 37, LOCAL 1549
THE CITY OF NEW YORK OFFICE OF
LABOR RELATIONS and ADMINISTRATION
OF CHILDREN'S SERVICES,

Respondents.
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DECISION AND ORDER

On February 22, 2001, Flora Gillard filed a *pro se*[1] improper practice petition pursuant to §12-306 of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") against District Council 37, Local 1549 (the "Union") alleging a breach of duty of fair representation.[2] Pursuant to NYCCBL §12-306d, Petitioner also

[1] During the pendency of this matter, Petitioner obtained counsel who filed reply papers on her behalf.

[2] NYCCBL §12-306b provides in pertinent part that it is an improper practice for a public employee organization or its agents to:

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;
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> * * *
>
> (3) to breach its duty of fair representation to public employees under this chapter.

named the Administration for Children's Services of the City of New York ("ACS").[3] Petitioner alleges that ACS improperly laid her off from her provisional title. This Board finds that the petition is time-barred and, in any event, Petitioner has failed to demonstrate that the Union breached its duty of fair representation or that ACS violated any rights protected under the NYCCBL. We therefore dismiss the petition.

BACKGROUND

On July 9, 1990, Petitioner was appointed as a provisional Clerical Associate for the Human Resources Administration of the City of New York. On June 23, 1996, Petitioner was transferred to ACS and remained in her provisional title.

Petitioner never took the civil service examination for Clerical Associate. On April 21, 1999, the Department of Citywide Administrative Services established a list of eligible candidates for appointment to the Clerical Associate title. Petitioner's name did not appear on the Clerical Associate list or on any other active civil service list for possible appointment to another title.

On June 2, 2000, Petitioner was notified by ACS that her employment was terminated and that her provisional position had been filled from the open competitive civil service list for Clerical Associate. Petitioner met with the Union and was advised that because she was not on

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[3] NYCCBL §12-306d provides:

> **Joinder of parties in duty of fair representation cases.** The public employer shall be made a party to any charge filed under paragraph three of subdivision b of this section which alleges that the duly certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

the certified Clerical Associate civil service list, her termination was mandated by law. The Union took no action on her behalf.

POSITION OF THE PARTIES

Petitioner's Position

Petitioner alleges that on June 2, 2000, ACS laid her off, terminated her health benefits and replaced her with a non-union employee because she lacked civil certification in the title of Clerical Associate. In 1999, other provisional clerical staff members were offered the opportunity to be certified to the title of Clerical Associate without having to take a civil service exam, but this opportunity was not provided to her. Petitioner also claims that the Union failed to: (1) represent her before, during, and after her termination; (2) file a grievance on her behalf; and (3) advise her to file an improper practice petition with the Board of Collective Bargaining. Petitioner alleges that Respondents' acts violated Article XVII of the parties' collective bargaining agreement[4] as well us unspecified provisions of state and federal law.

The Union's Position

The Union contends that: (1) the petition is untimely; (2) the petition fails to state a claim that the Union breached its duty of fair representation; (3) ACS's termination was required by law; (4) Petitioner has failed to show the Union treated her differently from other members or was hostile or discriminatory towards her; and (5) the Board lacks subject matter jurisdiction over claims arising outside the NYCCBL.

[4] Article XVII of the parties' collective bargaining agreement sets forth the procedures to be followed where lay-offs are scheduled.

ACS's Position

ACS contends that: (1) the petition is untimely; (2) the Board lacks jurisdiction over the alleged contract violations because Petitioner failed to avail herself of the grievance procedure; (3) Petitioner's termination was required by law; (4) the decision to terminate Petitioner falls within the management's rights provision in NYCCBL § 12-307(b);[5] (5) Petitioner's reliance on Article XVII of the Citywide Agreement is misplaced as she was not "laid off" but was terminated pursuant to New York State Civil Service Law ("CSL") § 65;[6] and (6) the Board lacks subject matter jurisdiction over claims arising outside the NYCCBL.

DISCUSSION

The first question the Board must decide is whether the petition is timely. Section 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) and §12-306(e) of the NYCCBL provide that a petition alleging an improper practice in violation of §12-306 may be filed no later than four months after the disputed action took place. Here, the petition is untimely because Petitioner's time to file started to run on June

[5] NYCCBL §12-307b grants the employer the right "to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization and the technology of performing its work. . . .

[6] Section 65 of the CSL provides in relevant part that a "provisional appointment to any position shall be terminated within two months following the establishment of an appropriate eligible list for filling vacancies in such positions. . . ."

2, 2000, when she was terminated by ACS and the Union allegedly failed to represent her. Petitioner filed the instant petition on February 22, 2001, which is more than four months after the alleged improper practices occurred. Petitioner argues that her petition should be deemed timely because between September and December 8, 2000, she was led to believe that the Union was going to take some action on her behalf and when she found out about her right to seek relief before this Board, she filed the instant petition. We are unpersuaded by this argument. However, even if we were to deem the petition timely, it would still be dismissed.

With regard to Petitioner's claims against the Union, the duty of fair representation requires only that a union act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing collective bargaining agreements. A union is permitted wide discretion in contract administration, as long as its refusal to act on a complaint is made in good faith and in a manner which is neither arbitrary nor discriminatory. Therefore, a union does not breach its duty merely because it refuses to advance a grievance.[7]

Here, Petitioner has failed to show that there was any alleged contractual violation for which a grievance could have been filed and, thus, that the Union breached its duty of fair representation by not proceeding on such a grievance. Section 65 of the CSL requires that provisional employees be terminated within two months of the establishment of an appropriate civil service list. Here, it is undisputed that Petitioner failed to take the civil service exam which could have made her eligible for appointment to the title of Clerical Associate from the appropriate civil service list.

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[7] *See Abdul-Rahim*, Decision No. B-19-97 at 4; *Edwards*, Decision No. B-23-94 at 13-15; *Gaud*, Decision No. B-58-88 at 12 .

Petitioner's reliance on Article XVII of the parties' collective bargaining agreement concerning lay-offs is misplaced. Generally, a lay-off is a personnel decision concerning termination of employees because of economic or other legitimate reasons, and management has the right under NYCCBL §12-307b to direct its employees and maintain the efficiency of its operations.[8] Here, Petitioner was terminated pursuant to the CSL § 65. Since the rights of provisional employees are limited by law, the Union could not and did not have an obligation to file a grievance on Petitioner's behalf.[9] Finally, even if Petitioner had not been a provisional employee, she has not shown that the Union's failure to bring her grievance to arbitration was arbitrary, capricious or discriminatory.

As there is no claim against the Union, the derivative claim against ACS cannot stand.[10] In any event, a finding of an improper employer practice under our statute requires a claim that the employer interfered in some way with protected employee rights.[11] These include, broadly, the rights to form, join and organize public employee organizations and the right to refrain from so doing.[12] Here, the petition does not allege any violation by ACS of rights protected under our statute.

With regard to claims of alleged violations of federal and state law, the claims are

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[8] *See Communications Workers of America, Local 1180*, Decision No. B-19-99 at 11.

[9] *See Abdul-Rahim*, Decision No. B-19-97 at 4-5*; Thomas,* Decision No. B-18-89 *at 7-8; Gaud,* Decision No. B-58-88 at 12-13*; Nelson*, Decision No. B-51-88 at 7.

[10] *See Green*, Decision No. B-34-2000 at 9.

[11] *See Abdul-Rahim*, Decision No. B-19-97 at 5.

[12] *See* NYCCBL §§12-305 and 12-306.

external to the NYCCBL, and a thus beyond the jurisdiction of this Board.[13]

[13] *See Green*, Decision No. B-34-2000 at 9.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition filed by Flora Gillard in the matter docketed as BCB-2195-00 be, and the same hereby is, denied in its entirety.

Dated: New York, New York
October 29, 2001

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER